Supreme Court, U.S.
FILED
DEC 19 1985
JOSEPH

Nos. 85-526 and 85-576

In the Supreme Court of the United States

OCTOBER TERM, 1985

NEWBY FRANKLIN LOVE AND
SUE ROBINSON YOUNGBLOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT EDWARD LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instructions on intent, proof beyond a reasonable doubt, the credibility of witnesses, and the "mere presence" doctrine constituted reversible error (No. 85-526).

2. Whether petitioner was denied a fair trial by the prosecutor's disclosure of the identity of a confidential government informant shortly before the close of the government's case-in-chief where the informant was unavailable to and did not in fact testify at trial (No. 85-576).

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No. 85-526

NEWBY FRANKLIN LOVE AND
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 767 F.2d 1052.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 85-526.

JURISDICTION

The judgment of the court of appeals in both cases, which were consolidated in that court, was entered on July 3, 1985. A petition for rehearing was denied on July 29, 1985 (Pet. App. 28a). The petition for a writ of certiorari in No. 85-526 was filed on September 25, 1985. The petition for a writ of certiorari in No. 85-576 was filed on September 30, 1985, and therefore is three days out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962, and a variety of violations of the federal narcotics laws, 21 U.S.C. 842(a)(1), 846, 952(a), 960 and 963. Pet. App. 3a & nn.1-2. Petitioners Love and Youngblood were also convicted of violating the Travel Act, 18 U.S.C. 1952(a)(3), and transporting a stolen aircraft in interstate commerce, in violation of 18 U.S.C. 2313. Finally, petitioner Love was also convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner Love was sentenced to a total of 70 years' imprisonment. Petitioner Youngblood was sentenced to a total of 35 years' imprisonment and three years' special parole. Petitioner Lee was sentenced to a total of 25 years' imprisonment and a special parole term of 25 years. Pet. App. 3a-4a & nn.1-2, 5. The court of appeals affirmed (Pet. App. 1a-26a).

1. The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals (Pet. App. 5a-11a). It showed that petitioners Love and Youngblood began to engage in interstate drug trafficking in 1980 and 1981, that they branched out into armed robberies in 1982, and that they continued to traffic in

cocaine that year. They also attempted to smuggle marijuana and cocaine from Colombia into this country. Petitioner Lee served as the pilot on a smuggling venture in December 1982. Pet. App. 5a-6a, 9a. In 1982, Youngblood and Love formed a drug trafficking partnership. Youngblood supplied cocaine that she transported from Florida to South Carolina, and Love then sold this cocaine to area drug dealers. Love also directed two of his associates to rob competing drug dealers and other persons whom Love believed would be unlikely to report the crimes to the police. Love furnished the weapons and vehicles that were used in the robberies and afterwards received the proceeds. Youngblood also received some stolen jewelry from one robbery. Lee was not involved in these crimes. Pet. App. 5a-6a.

During the latter half of 1982, Love and Youngblood attempted to smuggle marijuana and cocaine by airplane directly from Colombia, South America, to South Carolina, but they were unsuccessful on three different occasions. In November 1982, Love contacted Joseph Merolla, the owner of an airplane leasing service, and Frank Kelly, a Florida airport employee, for assistance in finding qualified pilots. Unbeknownst to Love, however, both Merolla and Kelly were informants for the Drug Enforcement Administration (DEA). When Love and Youngblood were unsuccessful in finding a qualified pilot, Kelly agreed to pilot the transport plane, and petitioner Lee was selected as Kelly's co-pilot. Lee and Kelly left for South America, but their trip was aborted when Kelly deliberately caused the plane to develop engine trouble. The scheme eventually failed when the aircraft, piloted by others, blew up after its takeoff in Colombia. Pet. App. 6a-9a.

Despite this setback, Love and Youngblood planned another smuggling venture. In early December 1982, Merolla informed the DEA that Love and others were planning to smuggle 700-800 pounds of cocaine from Colombia to

South Carolina around December 20. Merolla, who was responsible for equipping the transport plane with long range fuel tanks, installed an electronic beeper on the plane to enable the DEA to track its route. On December 19, Lee piloted the airplane to South America. Federal and state agents began surveillance of Lee's farm, the suspected primary landing site, as well as nearby airports in Sumter County, South Carolina. At roughly 9:00 p.m. that evening, the pilot of the transport plane requested clearance to land at the Sumter County Airport. Two men who knew Lee identified him as the pilot. After the plane landed, the agents sealed off the airport and searched the plane. They discovered 955 pounds of cocaine on board, two letters addressed to Lee from his attorney, a monogrammed shirt with Lee's initials, a thermos bottle containing Lee's fingerprints, and aeronautical charts in Lee's handwriting. The agents also stopped a pickup truck on an access road at the end of the runway; Lee was the driver. He appeared exhausted and reeked of chemicals. When arrested, Lee had Youngblood's telephone number on a slip of paper. Pet. App. 9a-10a.

Later that night, around 2:15 a.m., Youngblood and Love went to Lee's farm, where they were arrested. Both were later allowed to relieve themselves outdoors near the house. Agents later discovered several packages of cocaine and some torn-up papers in that area. The papers included the telephone numbers of Lee and another co-conspirator. Pet. App. 10a-11a.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-26a). It rejected their challenges to the district court's jury instructions on the ground that the instructions explaining reasonable doubt and credibility of witnesses did not constitute plain error when considered in light of the entire charge (*id.* at 14a-16a). The court also found that the instructions on intent did not impermissibly shift the

burden of proof to petitioners because the jury was not required to draw any inference of intent (*id.* at 13a-14a). The court also held that the instructions on the "mere presence doctrine" were not misleading or confusing (*id.* at 12a-13a). Finally, the court summarily rejected petitioner Lee's claim that the government's allegedly untimely disclosure of a confidential informant's identity denied him a fair trial (*id.* at 25a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

1. Petitioners Love and Youngblood argue (85-576 Pet. 7-13) that the district court's instructions on intent, proof beyond a reasonable doubt, the credibility of witnesses, and the "mere presence" doctrine were prejudicially erroneous. However, most of petitioners' claims were not properly preserved for review. Petitioner Love did not object to any of these instructions (C.A. App. 157), and petitioner Youngblood objected only to the "mere presence" charge (*id.* at 159-160). Aside from that exception, petitioners' challenges to the district court's jury charge can be sustained only if the instructions amounted to plain error. See, *e.g., United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 12-14; *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Under this standard, and given the overwhelming proof of petitioners' guilt, which they themselves appear to acknowledge (see 85-526 Pet. 3-6), the court of appeals correctly rejected petitioners' claims.

a. Petitioners contend (85-526 Pet. 7-8) that one of the district court's instructions on intent contained a mandatory presumption that shifted the burden of proof from the government to them, in violation of *Francis* v. *Franklin*,

No. 83-1590 (Apr. 29, 1985), and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).[2] That claim lacks merit.

To begin with, the instructions given here are materially different from those given in *Francis* and *Sandstrom*. In *Francis*, the instructions stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will" and that "[a] person [] of sound mind [] and discretion is presumed to intend the natural and probable consequences of his acts" (slip op. 8). Similary, in *Sandstrom* the instruction said that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" (442 U.S. at 515). In each case, the instruction directed the jury to presume an essential element of the charged offense. By contrast, the instructions here told the jury only to "consider it reasonable" to infer that a person ordinarily intends the natural and probable consequences of his acts and did not tell the jury that it must draw that inference (C.A. App. 145); indeed, in the very next sentence the district court expressly told the jury that it "may draw the inference" (*ibid.*). As the court of appeals correctly noted (Pet. App. 14a), "the charge merely instructed the jury as to what a reasonable inference would be. The individual jurors were not required to draw any inference." Moreover, the instruction here also differed from those in *Francis* and *Sandstrom* in that the inference was to be drawn only from those acts that were "knowingly done or knowingly omitted" (C.A. App. 145). The instructions here therefore did not shift the burden of proving intent from the government to the defendant. See, *e.g.*, *United States* v. *Johnson*, 756 F.2d 453, 454-455 (6th Cir.

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[2]That charge was as follows (C.A. App. 145): "Now you must consider it reasonable to draw the inference and find that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted."

1985); *United States* v. *Caucci*, 635 F.2d 441, 447 (5th Cir.), cert. denied, 454 U.S. 831 (1981).

Furthermore, a single jury instruction may not be considered in isolation, but must be viewed in the context of the entire charge and the record of the trial, because the charge as a whole may clarify an ambiguous instruction or, by correctly stating the law, dissipate any prejudicial effect resulting from a single erroneous instruction. See, *e.g.*, *Francis*, slip op. 11; *Henderson* v. *Kibbe*, 431 U.S. 145, 152-156 (1977); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975). Here, the district court repeatedly instructed the jury that the government had the burden of proving petitioners' guilt beyond a reasonable doubt (C.A. App. 95, 97-98, 101, 103, 109-110, 111-112, 126, 127, 128, 134-135, 136-137, 137, 139, 140, 142-143, 144, 146, 177, 178, 180, 184A, 190, 193, 194, 195-196, 198), told the jury that it must consider the charge as a whole (*id.* at 93), and instructed the jury that it was "permitted to draw from any facts or evidence any reasonable inferences which a person serving as a juror would be permitted to draw from established facts" (*id.* at 92; see *id.* at 96, 101). The jury therefore could not have been confused on this issue.[3]

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[3]In any event, petitioners Love and Youngblood were not prejudiced by this instruction because their intent was not an issue at trial. Petitioner Love testified at trial and denied that he had committed any of the charged offenses; he also challenged the credibility of the government's witnesses (see 85-526 Pet. 6). Petitioner Youngblood did not testify or offer any evidence in her defense, but she sought to establish an alibi through cross-examination of the government's witnesses (C.A. App. 157). In these circumstances, any error in the instructions on intent was harmless. See *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion); *Martin* v. *Foltz*, 773 F.2d 711, 719 (6th Cir. 1985); *Tucker* v. *Kemp*, 762 F.2d 1480, 1496, 1501-1503 (11th Cir. 1985) (en banc); *Garland* v. *Maggio*, 717 F.2d 199, 203-204 (5th Cir. 1983); *McGuinn* v. *Crist*, 657 F.2d 1107, 1108-1109 (9th Cir. 1981), cert. denied, 455 U.S. 1107 (1982); cf. *United States* v. *Frady*, 456 U.S. 152, 169-174 (1982).

b. In defining a reasonable doubt, the district court told the jury that a reasonable doubt was "not a slight doubt" and was "not a fanciful doubt," but was "a fair doubt based upon reason and common sense, and arising from the state of the evidence[,] * * * a doubt for which you can assign a reason" (C.A. App. 97). The court also explained that "[p]roof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important affairs of your own life. A defendant is not to be convicted on mere suspicion or conjecture" (*ibid.*). The trial court further told the jury that a reasonable doubt exists "when after a careful and impartial consideration of all of the evidence, you the jury does [*sic*] not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges" (*id.* at 98). Petitioners Love and Youngblood contend (85-526 Pet. 9-10) that the latter two instructions diluted the government's burden of proof. The court of appeals, however, correctly found that the instructions, taken as a whole, did not constitute plain error.

The court's definition of a reasonable doubt as a "fair doubt based upon reason and common sense" was correct (see, *e.g., United States* v. *Del Toro Soto*, 676 F.2d 13, 17 (1st Cir. 1982)), and it is endorsed by 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 11.14 (1977). The instruction on "willingness to act" is consistent with, although phrased differently from, the instruction approved in *Holland* v. *United States*, 348 U.S. 121, 140 (1954). Addition of the "moral certainty" instruction did not make the entire charge improper. Although the "moral certainty" language has been criticized on the ground that it may induce the jury to decide the case based on its feelings rather than on the evidence,[4] where, as here, the instruction

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[4]The instruction can also be said to be unduly favorable to the defense, since the jury could construe the charge to require a higher standard of proof than proof beyond a reasonable doubt. Petitioners' failure to object may indicate satisfaction that the charge was favorable.

is part of a charge requiring the jury to base its verdict on the evidence (see, *e.g.*, C.A. App. 92, 93, 96-99), there is no realistic possibility that the jury will be confused. See *United States* v. *Drake*, 673 F.2d 15, 21 n.6 (1st Cir. 1982). Petitioners therefore were not prejudiced by this instruction. See *United States* v. *Del Toro Soto*, 676 F.2d at 17; *United States* v. *Drake*, 673 F.2d at 20-21; *United States* v. *Previte*, 648 F.2d 73, 83 (1st Cir. 1981); *United States* v. *Clayton*, 643 F.2d 1071, 1074-1075 (5th Cir. 1981); *United States* v. *Magnano*, 543 F.2d 431, 436-437 (2d Cir. 1976).[5]

c. The district court instructed the jury that it was the sole judge of the credibility of witnesses and that it should carefully scrutinize their testimony (C.A. App. 98). The court reiterated that principle with respect to the testimony of accomplices and informants (*id.* at 101-102). The court also instructed the jury to consider a witness's intelligence, motive, state of mind, and similar factors in evaluating the witness' credibility (*id.* at 99). The court further charged that "[i]f you find the presumption of truthfulness to be

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[5]None of the cases cited by petitioners (85-526 Pet. 9-10) holds that the use of this instruction amounts to plain error. In fact, only one case set aside a conviction because of an erroneous instruction on the term reasonable doubt, *Dunn* v. *Perrin*, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910 (1978), and the instructions in that case erroneously defined that term three times, in a manner that shifted the burden of proof to the accused (570 F.2d at 24-25).

Petitioners also criticize (85-526 Pet. 10) that portion of the charge telling the jury to "say so" whether a defendant was guilty or not (C.A. App. 148). However, the district court repeatedly instructed the jury on the government's burden of proof. Accordingly, there is no realistic possibility that this instruction led the jury to believe that the defendant bore the burden of proof, and no plain error arose from the giving of this instruction. See *United States* v. *Thomann*, 609 F.2d 560, 565 (1st Cir. 1979); *United States* v. *Urbanis*, 490 F.2d 384, 386-387 (9th Cir.), cert. denied, 416 U.S. 944 (1974); *United States* v. *Cummings*, 468 F.2d 274, 280-281 (9th Cir. 1972). None of the cases cited by petitioners (85-526 Pet. 10) is to the contrary.

outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves" (*ibid.*). Finally, the court charged that the jury had the exclusive power to give a witness such credibility as it deemed proper (*id.* at 100).

Although petitioners Love and Youngblood are correct (85-526 Pet. 11) that a "presumption of truth" instruction is disfavored, the use of that instruction does not automatically constitute reversible error. *Cupp* v. *Naughten*, 414 U.S. 141 (1973). For instance, when a defendant testifies or presents defense witnesses, as petitioner Love did in this case, he receives the benefit of the presumption in the same manner as the government's witnesses. Thus, as to petitioner Love, the instruction did not unfairly benefit the prosecution. See, *e.g.*, *United States* v. *Gutierrez-Espinosa*, 516 F.2d 249, 250 (9th Cir. 1975); *United States* v. *Boone*, 401 F.2d 659, 661-662 (3d Cir. 1968), cert. denied, 394 U.S. 933 (1969). Moreover, any potentially prejudicial effect of the instruction was substantially diluted by the court's other instructions on the meaning of a reasonable doubt, the government's burden of proof, and the jury's power to decide the credibility of witnesses and to reject testimony that it found unreliable. Those instructions correctly informed the jury of its duty to determine whether a witness was credible and thereby eliminated any prejudicial effect of the challenged instruction. In these circumstances, the use of the "presumption of truth" instruction did not constitute plain error. See *United States* v. *Ramos-Alganin*, 584 F.2d 562, 569 (1st Cir. 1978); *United States* v. *LaRiche*, 549 F.2d 1088, 1093-1094 (6th Cir.), cert. denied, 430 U.S. 987 (1977); *United States* v. *Chrisco*, 493 F.2d 232, 238 (8th Cir.), cert. denied, 419 U.S. 847 (1974); *United States* v. *Safley*, 408

F.2d 603, 605-606 (4th Cir.), cert. denied, 395 U.S. 983 (1969).[6]

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[6]Petitioners Love and Youngblood also contend (85-526 Pet. 11-12) that they were prejudiced by the district court's "mere presence" instruction. The district court gave the following instruction on the "mere presence" doctrine (Pet. App. 12a n.7; C.A. App. 146): "I would instruct you that mere presence at or near the scene of a crime, or where a crime was supposed to be committed, is insufficient to establish that a defendant joined a conspiracy or aided and abetted in the commission of the crime. If you should find that Ruiz and Restrepo were not willfully part of the conspiracy, or that they were—and that they were—and that they were merely present near where the crime was committed then it would be your duty to find them not guilty." Ruiz and Restrepo were co-defendants in this case and were acquitted on all of the charges against them. The district court gave the charge in this form because Ruiz and Restrepo had requested it. Petitioner Love and Youngblood contend that they were prejudiced by this instruction because only their co-defendants were specifically identified. That contention is not well-founded, and there is no conflict among the circuits on petitioners' fact-bound claim.

To begin with, petitioner Love erroneously asserts (85-526 Pet. 12) that he objected to the district court's charge on the mere presence doctrine. Petitioner Love's counsel initially stated that he had no objections to the charge (C.A. App. 157) and his later remarks, read in context, do not expressly state an objection to the charge (*id.* at 169). Moreover, the proof of Ruiz's and Restrepo's involvement in the smuggling operation was quite limited; they were arrested while driving a recreational vehicle outside of Lee's farm, and there was no direct proof that they were involved in the smuggling operation (10 Tr. 220-228, 252-256, 263, 273-286, 289-293; 11 Tr. 218-231). The proof of Love's and Youngblood's involvement was far more substantial. Beyond that, because both petitioners presented alibi defenses (see page 7 note 3, *supra*), the "mere presence" instruction was not relevant to their defenses. In any event, the jury charge, read as a whole, included them as well. The district court also instructed the jury that (C.A. App. 132): "Mere association between a principal and the accused of aiding and abetting is not sufficient to establish guilt, nor is mere presence at or near the scene, or even knowledge that the crime was being committed, sufficient, standing by itself, to establish aiding and abetting." This charge also referred to the "mere presence" doctrine, and it did not identify any particular defendant or suggest that it was inapplicable to petitioners.

2. Petitioner Lee contends (85-576 Pet. 13-32) that he was denied a fair trial because the prosecutor did not reveal the identity of a confidential government informant until shortly before the close of the government's case-in-chief. The court of appeals summarily rejected this insubstantial claim (Pet. App. 25a), and its ruling does not warrant further review.

As explained above, in mid-December 1982, Joseph Merolla, the owner of an airplane leasing company used by petitioner for a smuggling operation and also a confidential government informant, tipped off the DEA that petitioner Love was preparing to smuggle cocaine from Colombia to South Carolina by airplane on December 19 (Pet. App. 8a-9a). Merolla also tentatively identified Garrett Clark as the scheduled pilot of the transport plane (*id.* at 23a). On December 17, the Miami DEA office sent the DEA office in Columbia, South Carolina, a telex describing Merolla's tip, but not identifying him as its source (85-576 Pet. App. 85-86). The government furnished petitioner with a copy of the telex either before or during the trial (see Gov't C.A. Br. 52-53).

Before trial, petitioner Lee moved for disclosure of the identity of any government informants. The government moved to withhold its informants' identities until they had testified, "for security reasons" (85-576 Pet. App. 97), and the prosecutor told the court that all participating informants would testify (*id.* at 96-98). The court granted the government's motion. However, during the government's case-in-chief the prosecutor informed the district court that he had been unable to locate Merolla despite having issued two grand jury subpoenas and two trial subpoenas for him and despite having asked the Marshal's office, the DEA, and the FBI for their assistance in discovering Merolla's whereabouts. Shortly thereafter, the court ordered the government to disclose Merolla's identity to the defense,

and the government complied (9 Tr. 23-25, 83-85; 85-576 Pet. App. 99-101). Merolla did not testify at trial.[7]

Petitioner's claim appears to be that the government denied him a fair trial by failing to divulge Merolla's identity prior to trial, which deprived him of the opportunity to present an exculpatory defense witness. However, petitioner has failed to demonstrate that Merolla's expected testimony would have led to a different outcome at trial. See *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10. Merolla's tentative identification of Clark as the pilot of the transport plane several days before the actual flight took place was not exculpatory (see, *e.g.*, *Hughes* v. *Hopper*, 629 F.2d 1036, 1040 (5th Cir. 1980), cert. denied, 450 U.S. 933 (1981)), and the court of appeals found that there was "overwhelming evidence in the record implicating [petitioner] Lee and contradicting the 'tentative' identification of Clark as the pilot in the telex" (Pet. App. 23a (footnote omitted); see *id.* at 23a-24a n.14 (describing the evidence)). Accordingly, even assuming that petitioner Lee could have subpoenaed Merolla had he been aware of Merolla's identity before trial, there is no reasonable probability that Merolla's testimony would have led to petitioner's acquittal. See *Bagley*, slip op. 10-14.

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[7]At trial, petitioner Lee unsuccessfully sought to introduce the telex into evidence and to cross-examine a witness about its contents. Assuming that the district court had erred by denying petitioner the right to introduce the telex, the court of appeals held that any error was harmless given the overwhelming proof that Lee had piloted the aircraft (Pet. App. 23a & n.14). Lee has not sought review of that ruling in this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

DOJ-1985-12